

## Chapter 7

# FORMALIZING THE CONTRACT

Once you have selected a service provider, the next step is to prepare a written contract identifying all terms of agreement between the contracting parties.

### 7.1 INDEPENDENT STATUS OF CONTRACTOR

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An essential criterion in the use of services is the independent entrepreneurial relationship between the contractor and the department. Departments could potentially be subject to payment of fines by the Internal Revenue Service and the Social Security Administration, if a determination of "employee" status is made regarding the department's contracts.

Federal employment tax regulations essentially convey that every individual is an employee, if under the usual common law rules the relationship between the individual and the person for whom services are performed is the legal relationship of employee/employer. Generally, such a relationship is considered to exist when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished, but also as to the details and means by which the result is accomplished. It is not necessary that the employer direct or control the manner in which the services are performed, rather it is sufficient that the employer has the right to do so. DAS-State Accounting Enterprise, Accounting Policy and Procedure Manual, Procedure 240.102 includes additional information about the factors to consider when trying to determine if the contract creates an employer/employee relationship.

Prior to signing a contract, the department must determine if Department of Administrative Services - State Accounting Enterprise (DAS-SAE) has made a determination as to whether or not the contractor has an employer/employee relationship with the State. **Contracts that create an employer/employee relationship are not allowed.** The department must review VCUSTD (Vendor Customer Table) that is a part of the Iowa statewide accounting system (I/3). If DAS-

SAE has determined that no employer/employee relationship with the State exists the SAE CONTROL # field will contain the control number. If the SAE CONTROL # is blank on VCUSTD, Chapter 9 contains more detailed instructions on how to comply with this requirement and how to complete the required forms related to this requirement.

## **7.2 DRAFT CONTRACT**

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Service contracts must always be set forth in writing. Frequently terms and conditions of the contract will be included in a Request for Proposal (RFP) document. RFP's, however, usually permit the agency to negotiate on the terms of the contract if it is in the agency's best interest to do so. Although it is permissible to negotiate further after you have selected a service provider, you must be careful to avoid undermining the competitive selection process during the negotiations. As a basic rule of thumb, if other service providers might have been able to submit a better, more competitive proposal if they had been given an opportunity to make a proposal on the project as revised by the negotiations, then agreeing to the change undermines the competitive process. For example, if you are trying to negotiate a lower price and the service provider agrees to accept a lower price in return for removing a major component of the project, that change undermines the competitive process because another service provider might have been able to submit a better proposal if it had been given the opportunity to bid on the project without that component. You should consult with your legal counsel if you are contemplating making changes that might be significant enough to raise these concerns. Agencies may utilize a contract format appropriate to the services being acquired, provided that all required elements stated in **11 IAC chapter 107** are included.

The formal written contract should include all terms and conditions and reflect the intent and agreement of the parties. The contract is the culmination of the entire procurement process and formalizes the agreement between the parties.

## **7.3 TERMS AND CONDITIONS**

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The Terms and Conditions are the stipulations governing a specific contract and include the elements indicated below. Many other requisites may be routinely included in an agency's Special Terms and Conditions. For the purposes of this *Guidebook*, only the most common elements are included. The Model Contract included in Appendix I contains additional information about the purposes of these clauses and considerations you should take into account when drafting contracts.

- **Identification of the Parties**

This section identifies the parties entering into the contract. It states the name of the agency, the contractor's legal corporate name and address, and may include other identifying information such as telephone number, fax number, e-mail address.

- **Scope of Work**

The scope of work is the single most important element in the contract. This section documents all elements of the work and magnitude of the project and reflects the mutual understanding of the parties. The scope of work must be consistent with the project and services described in the solicitation document issued. The scope of work should clearly address the performance criteria that the service provider is expected to meet. Refer to Chapter 3 for more detailed information on how to develop an effective scope of work.

- **Duration**

The contract should specify a starting date and an ending date. You should not enter into a service contract for a period of longer than six years (including extensions) unless you get a waiver of the duration limitation from the Director of the Department of Administrative Services. See 11 IAC 106.11. If you want to be able to extend the contract beyond its initial term, the duration provision should also address contract extensions. If the contract resulted from a competitive selection process, the contractual provision regarding the initial term of the contract and any allowable extensions must be consistent with the duration and extension provisions provided in the competitive selection process.

Service contracts may cross biennial and fiscal year lines, and, when they do, the contract should include a non-appropriation provision.

- **Compensation and Payment**

This section must include all elements relating to cost and payment, such as maximum contract cost, cost per deliverable, rates for individuals providing services, number of hours required, allowable expenses and total authorized for expenses, payment, and invoicing procedures. Under the Accountable Government Act, payment should be tied to the service provider's performance under the contract unless the agency has received permission to use a different method. Clearly defining cost elements authorized for reimbursement will avoid later confusion or minimize disputes.

**With few exceptions, agencies may not pay for any service before the service has been performed. See Iowa Code section 8A.513 and IAC 11 – 41.1(1).**

This section should also include whether the agency will pay expenses incurred by the contractor and, if so, which ones. Such expenses may include airfare (economy or coach class), lodging and subsistence necessary during periods of required travel, expenses incurred during travel for telephone, copying and postage, and private vehicle mileage. If other types of expenses are to be allowed, they must be clearly defined. Travel expenses for contractors may only be reimbursed at the current state travel reimbursement rates. Separate payment for these expenses should be discouraged. Ideally, these travel related and other expenses should be built into the basic cost of the contract.

The contract should state the maximum dollar amount allowed to be paid under the contract for expenses.

The contract should state how often invoices should be submitted and require that the invoice include sufficient detail and back-up documentation to determine the appropriateness of the charges.

- **Termination Clause**

Contracts should include a termination clause including a non-appropriation clause. Service contracts may cross biennial and fiscal year lines, and, when they do the contract should specifically include a non-appropriation provision.

- **Signatures of Responsible Parties**

Only those persons with authority to bind the parties may sign the contract document. The agency representative who signs a contract must have delegated signature authority. The contract is considered executed when all authorized parties have affixed their signature.

It is good business practice to have the contractor sign the document first. This ensures that full agreement has been reached by the contractor with the terms and the agency can respond with its approval signature.

The signature block should not appear on a page by itself. A portion of the text of the contract should be included at the top of the page.

## **7.4 LEGAL REVIEW**

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You may wish to ask your agency's assistant attorney general to review the contract before you finalize it. You should consult with your legal counsel if you are considering making any changes in the contract that the sample Model Contract included in Appendix I says you should not make or says you should consult your attorney before making. Please note that if you intend to request a contract review by the AG's office, the review must be done before the contract is signed. Once the contract has been signed, it has been "executed" and any subsequent legal review serves no purpose. If you need to have your assistant attorney general review the contract, you should plan on giving the attorney enough time to fit it into his or her schedule and to review it.

You should work with your assistant attorney general to decide what is the most effective way to utilize your attorney's review.

## **7.5 CONTRACT PAYMENT TERMS**

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Pursuant to the Accountable Government Act as it relates to service contracting and the rules adopted in accordance therewith, agencies must include performance criteria in service contracts and tie payment to performance, unless the agency gets permission to use a different method. See Iowa Code section 8.47, 11 IAC chapter 107.

## **7.6 CONTRACT EXECUTION**

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The contract is executed when it is signed by all authorized parties. Upon execution, signed copies of the contract should be provided to all interested parties including, but not limited to, the contractor, the contract manager, and anyone in the agency responsible for maintaining contract files. In most instances, service may begin immediately or may be scheduled for a predetermined date.

Appendix I: <http://das.gse.iowa.gov/services/AppI-ModelContract.pdf>

Appendix K: <http://das.gse.iowa.gov/services/AppK-NoticeofIntenttoAwardRFP.pdf>

Appendix L: <http://das.gse.iowa.gov/services/AppL-NoticeofIntenttoAwardSealedBid.pdf>